UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MYRA A. HENDRICKS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 03-2239 (RMC)**
	)	
JOHN W. SNOW,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

Myra A. Hendricks is a Special Agent employed by the Treasury Inspector General for Tax Administration ("TIGTA"). She has filed a four-count complaint against John W. Snow, the Secretary of the Treasury, in his official capacity, for violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16, and the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* Ms. Hendricks's complaint alleges discrimination based on race, gender and age, as well as retaliation for prior equal employment opportunity ("EEO") complaints. The Secretary has filed a partial motion to dismiss and an alternative motion for summary judgment, which are opposed by Ms. Hendricks. As explained below, both motions will be denied.

BACKGROUND FACTS

After initially joining the Internal Revenue Service in 1984 as a GS-4 secretary, Ms. Hendricks earned regular promotions until reaching her current position as a GS-13 Special Agent in the Special Inquiries and Inspection Division ("SIID"). Compl. at ¶¶ 9-17. Ms. Hendricks alleges that after becoming a GS-13 Special Agent in 1999, SIID management discriminated against her, harassed her, created a hostile work environment, and retaliated against her for using the

administrative complaints process. *Id.* ¶¶ 18-74.

On August 1, 2000, Ms. Hendricks filed the first of three formal administrative complaints with the Equal Employment Opportunity Commission ("EEOC"), challenging her non-selection for various GS-14 positions with SIID. *Id.* ¶ 42; Def. Statement of Mat. Facts ¶ 11. She filed a second complaint alleging a hostile work environment and discrimination based upon race, sex, age, and retaliation on July 11, 2001, and a third on March 12, 2003 alleging a hostile work environment and discrimination and challenging her non-selection for various vacancies. *Id.* ¶¶ 12-13. In addition to these formal complaints, Ms. Hendricks contacted an EEO counselor on September 15, 2003 and initiated an informal complaints process for discrimination and retaliation. *Id.* ¶ 14.

On October 31, 2003, Ms. Hendricks filed a four-count complaint against the Secretary for race discrimination ("Count I"), sex discrimination ("Count II"), age discrimination ("Count III"), and retaliation ("Count IV"), for alleged violations of Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967. Ms. Hendricks essentially alleges that the agency has: 1) failed to select her for GS-14 Special Agent positions, selecting less-qualified agents outside of her protected group; 2) denied her opportunities to perform in career-enhancing "acting" positions; 3) given her complex, low-profile assignments; 4) disparaged her professional reputation; and 5) retaliated against her by, among other things, improperly conducting a background investigation. Compl. ¶ 4. *See id.* ¶¶ 18-74.

The Secretary has filed a partial motion to dismiss. He argues that Ms. Hendricks's

"Unwarranted Discipline Claim"[1] should be dismissed because she failed to exhaust administrative remedies and because the complaint provides no evidence of an adverse personnel action caused by the alleged discriminatory acts. Def. Memo. at 3. Similarly, the Secretary contends that Ms. Hendricks's "Non-recognition claim"[2] should be dismissed because of a lack of evidence of an adverse personnel action. *Id.* He also moves for partial summary judgment on the same grounds for these claims.

MOTION TO DISMISS FOR LACK OF JURISDICTION

A court may dismiss a complaint if it lacks the statutory or constitutional authority to hear a case. *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1187 (2nd Cir. 1996).

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[1] The Secretary styles the "Unwarranted Discipline Claim" as:

> [allegations] in the complaint that [Ms. Hendricks] has been subjected to unwarranted agency discipline after participating in the EEO process. In particular, plaintiff maintains that, on September 15, 2003, she received an "unwarranted" letter of reprimand and a counseling memorandum which was "not warranted." Plaintiff further contends that this memorandum "[was] the agency's attempt to discriminate and retaliate against [her] on the pretext of disciplining her for her alleged performance deficiencies."

Def. Statement of Mat. Facts ¶ 8. *See also* Compl. ¶¶ 42-47.

[2] The Secretary describes Ms. Hendricks's "Non-recognition claim" as:

> [allegations] that Treasury officials have discriminated against her by refusing to recognize plaintiff's accomplishments, not selecting plaintiff for career enhancing assignments and failing to give plaintiff cash awards and professional recognition. Finally, plaintiff maintains that the agency has subjected her to harassment and a hostile work environment in connection with her five-year background investigation.

Def. Statement of Mat. Facts ¶ 9.

Title VII of the Civil Rights Act of 1964, "proscribes federal employment discrimination and establishes an administrative and judicial enforcement system" for resolving claims of discrimination. *Brown v. Gen. Serv. Admin.*, 425 U.S. 820, 829 (1976). An employee of the federal government may file a civil suit to remedy alleged discriminatory practices. 42 U.S.C. § 2000e-16(c).[3] But first, a federal employee must normally timely file an administrative complaint and give the agency the opportunity to redress any wrongdoing prior to suit. *See id.*; 29 C.F.R. § 1614.105(a). *See also Brown v. Marsh*, 777 F.2d 8, 14 (D.C. Cir. 1985) (exhaustion gives notice and affords the agency the opportunity to address claims). It is well-settled that federal employees must, absent equitable considerations, exhaust their administrative remedies. *Bayer v. Dept. of Treasury*, 956 F.2d 330, 332 (D.C. Cir. 1992). *See also Park v. Howard Univ.*, 71 F.3d 904, 907 (D.C. Cir. 1995) (the exhaustion requirement gives the agency notice of the claim and narrows the issues for

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[3] Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

42 U.S.C. § 2000e-16(c).

adjudication). Failure to do so may deprive a district court of subject-matter jurisdiction. *See Artis v. Greenspan*, 158 F.3d 1301, 1303 (D.C. Cir. 1998) (affirming dismissal for lack of subject-matter jurisdiction where administrative remedies not exhausted).

The Secretary argues that Ms. Hendricks has not exhausted administrative remedies with respect to her Unwarranted Discipline Claim because she has not given the agency an opportunity to act on her administrative complaint. Def. Memo. at 8. He argues, "[b]ecause Plaintiff's claim is presently before the EEOC, it cannot be disputed that she has not provided the Treasury with an opportunity to act upon her administrative complaint before pursuing this action." *Id*. The exhaustion requirement is not as formalistic as suggested by this argument. There is no value to requiring a plaintiff to pursue an administrative complaint of retaliation prior to suit if the requirement would erect needless procedural barriers that are inconsistent with the purpose and policy objectives of Title VII. *See Gupta v. East Texas State Univ.*, 654 F.2d 411, 414 (5th Cir. 1981) (eliminating procedural barrier will deter employers from attempting to discourage employees from exercising their rights). Under such circumstances, the exhaustion requirement has not been construed as a bar to retaliation claims.

The Secretary correctly notes that *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) spoke to this issue and required "that all discrete discriminatory and retaliatory acts be fully exhausted as a prerequisite to suit." Def. Memo. at 8.[4] Furthermore, he notes that the exhaustion requirement has been avoided only in cases where the retaliation claims are "closely

[4] *Morgan* concerned exceptions to the timeliness requirements pertaining to acts of discrimination that occurred *before* an employee files a charge. *See Morgan*, 536 U.S. at 104. This case, and the precedent on which Ms. Hendricks relies, allege additional acts of discrimination that occurred *after* an employee files a charge, including acts of retaliation.

related to the earlier EEO action." *Id.* at 9. While the Secretary has provided a correct statement of the law, Ms. Hendricks's Unwarranted Discipline Claim is comfortably aligned with these same prerequisites for avoidance of the exhaustion requirement. Her claim involves alleged discrimination and retaliation reasonably related to the allegations in prior administrative complaints. Pltf. Opp. at 9-10. *See* Compl. ¶ 95 ("Defendant retaliated against plaintiff on account of her use of the administrative EEO process and because she voiced opposition to defendant's discriminatory employment practices by the actions alleged earlier in this Complaint . . . .") The law in the D.C. Circuit is clear. "An administrative charge specifying a pattern of ongoing discrimination will be interpreted as incorporating instances of subsequent, essentially similar conduct[;] no purpose would be served by demanding a stream of further administrative pleadings denoted 'charge' or 'complaint.'" *Loe v. Heckler*, 768 F.2d 409, 420 (D.C. Cir. 1985) (citation omitted). This concept is neither entirely elastic nor without limitation: the employer must be put on "notice that its actions allegedly violated Title VII" and must be "afforded an adequate opportunity to pursue a mutually satisfactory resolution with the employee . . . ." *Id.* As Ms. Hendricks argues without contradiction that TIGTA refused to cooperate with the administrative processing of her fourth administrative complaint once she commenced this action, Pltf. Opp. at 8 n.5; Pltf. Exh. 3, the agency had "a fair opportunity to provide full redress or to attempt an informal accommodation. Title VII requires no more." *Loe*, 768 F.2d at 418. Ms. Hendricks has sufficiently pursued her administrative remedies. The Secretary's motion must be denied.

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a complaint. FED. R. CIV. P. 12(b)(6). *Browning v. Clinton*, 292 F.3d 235, 242 (D.C.

Cir. 2002). Under the modern approach to notice pleading, a complaint need only set forth a short and plain statement of the claim, and the grounds on which it rests. *Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1040 (D.C. Cir. 2003). *See* FED. R. CIV. P. 8(a)(2).

The Secretary argues that Ms Hendricks's Unwarranted Discipline and Non-Recognition claims are not actionable because the complaint does not state a *prima facie* case of discrimination. He argues that dismissal is warranted because "the complaint demonstrates that plaintiff has not suffered any materially adverse consequences affecting the terms, conditions, or privileges of her employment with TIGTA, or her future employment, as a result of these alleged discriminatory acts," and further fails to state the elements of a retaliation claim. Def. Memo. at 13-15.

The Supreme Court has specifically addressed the "question [of] whether a complaint in an employment discrimination lawsuit must contain specific facts establishing a prima facie case of discrimination" to survive a motion to dismiss. *Swierkiewicz v. Sorema*, 534 U.S. 506, 508 (2002). The Court rejected a heightened pleading standard and held that "an employment discrimination plaintiff need not plead a prima facie case of discrimination and that petitioner's complaint is sufficient to survive respondent's motion to dismiss." *Id.* at 515. This guidance is clear and unequivocal; the Secretary's motion to dismiss for failure to state a claim will be denied.

CONCLUSION

For the reasons stated, the Defendant's partial motion to dismiss is DENIED. Summary judgment is DENIED because the facts remain in dispute. A separate order accompanies this opinion.

DATE: September 30, 2004

/s/
ROSEMARY M. COLLYER
United States District Judge